STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2012
v	No. 299163 Oakland Circuit Court
JAMES DONNELL JOHNSON, Defendant-Appellant.	LC No. 2009-226819-FC

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury of kidnapping, MCL 750.349, armed robbery, MCL 750.529, and second-degree criminal sexual conduct (CSC), MCL 750.520c. He was sentenced to concurrent prison terms of 20 to 30 years each for the kidnapping and robbery convictions, and 5 to 15 years for the second-degree CSC conviction. He appeals as of right. We affirm.

I. FACTS AND PROCEEDINGS

The complainant alleged that defendant and three codefendants accosted and robbed her while she was sitting in her car in the parking lot of her apartment complex. She testified at trial that the group forced her at gunpoint into the back seat of her car and stole money from her purse. Over the next several hours, they coerced her into taking them to her apartment, and into purchasing them alcoholic beverages. She also testified that, before releasing her, defendant and the three other codefendants forced her to perform oral sex on each of them. The complainant immediately reported the robbery and kidnapping to the police, but delayed revealing the sexual assaults until two months later. After some of the perpetrators were arrested, they told the police that the complainant agreed to perform oral sex on them in exchange for their promise to return the money they stole from her. The complainant disclosed the sexual assaults after the police confronted her with this information.

II. JUDICIAL MISCONDUCT

Defendant first argues that he was denied a fair trial by the trial court's comment, when instructing the jury, that the case was "about an event, a sad event." He contends that by characterizing the case as a "sad event," the court impermissibly conveyed to the jury that it believed the complainant's testimony. Because defendant did not object to the trial court's statement at trial, this issue is not preserved. *People v Sardy*, 216 Mich App 111, 117-118; 549

NW2d 23 (1996). Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantee a defendant the right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). A trial judge "'has wide discretion and power in matters of trial conduct[,]'" but the court may not pierce "'the veil of impartiality[.]'" *Id*. at 307-308, quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). "'The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial."'" *Id.* at 308, quoting *Collier*, 168 Mich App at 698. The trial court's comments must be reviewed in context and in light of the entire record. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Viewed in context, the trial court's isolated statement referring to the case as being about a "sad event" did not pierce the veil of judicial impartiality. Although conflicting versions of events were presented at trial, each version could fairly be described as "sad." The comment was not directed at any particular version. Moreover, the comment was brief and isolated, and given its benign nature, it was not clearly calculated to unduly influence the jury against defendant. Thus, there was no plain error. Furthermore, the trial court explicitly instructed the jury that its comments were not evidence, and that the jury should disregard any opinion that it believed the court might have expressed. This instruction was sufficient to protect defendant's substantial rights, as jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this unpreserved issue does not warrant appellate relief.

III. POLICE OFFICER TESTIMONY

Defendant next argues that the trial court erroneously allowed a police officer to testify that a victim of a violent crime who is also the victim of a sexual assault sometimes will not report the sexual assault. We review the trial court's decision to permit the testimony for an abuse of discretion. *People v Gipson*, 287 Mich App 261, 262; 787 NW2d 126 (2010). An abuse of discretion "exists when the trial court's decision falls outside the range of principled outcomes." *Id.*

Defendant elicited on cross-examination of Sheriff's Deputy Genefer Harvey that the complainant's initial report of the events was fractured and confusing. On redirect examination, the trial court permitted Harvey to testify that a victim of multiple crimes who is also the victim of a sexual assault will sometimes avoid reporting the sexual assault aspect because it is not something the person wants to talk about. Harvey testified that when the complainant later disclosed that she had been sexually assaulted during the ordeal, Harvey understood why the complainant's initial report seemed fractured and confusing.

The trial court did not abuse its discretion in permitting Harvey to testify on the general subject matter because defendant opened the door to the testimony. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because

credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). But when a defendant raises an issue, he opens "'the door to a full and not just a selective development of that subject.'" *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993), quoting *United States v Fairchild*, 505 F2d 1378, 1383 (CA 5, 1975). Here, defendant opened the door to Harvey's opinion of the complainant's initial statements by eliciting Harvey's admission that the complainant's initial reports appeared fractured and confusing to Harvey, a trained police officer. Having opened the door to this issue, it was not improper for the trial court to allow the prosecutor to explore on redirect examination whether anything caused Harvey's opinion to change. Harvey's testimony explaining the complainant's subsequent revelation of a sexual assault and the significance of that revelation to Harvey's understanding of the complainant's initial reports gave the jury a full account of Harvey's perception of the complainant's reports. Without Harvey's subsequent testimony, the jury would have been left with the inaccurate impression that Harvey believed that the complainant's version of the events was fractured and confusing, when in fact Harvey ultimately was able to use information she had learned in her police training to reconcile the seemingly illogical information that the complainant provided initially. Contrary to what defendant argues, Harvey did not offer an opinion on the credibility of the complainant's statements. Harvey merely testified that the complainant's initial fractured statement was consistent with what Harvey had learned at the seminar. Under these circumstances, the trial court did not abuse its discretion in permitting the challenged testimony on redirect examination.

III. SENTENCING GUIDELINES

Defendant's last argument is that the trial court erred in scoring offense variables 1, 2, 7, and 11 of the sentencing guidelines. Defendant preserved this issue with respect to the scoring of OV 2, OV 7, and OV 11 by objecting to the scoring of these variables at sentencing. MCR 6.429(C); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). However, defendant did not object to the scoring of OV 1, leaving that scoring challenge unpreserved.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (quotations and citation omitted). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (quotations and citation omitted). An unpreserved scoring issue is reviewed for a plain error affecting the defendant's substantial rights. *Kimble*, 470 Mich at 312.

The trial court scored 15 points for OV 1 (firearm pointed at or toward the victim), MCL 777.31(1)(c), and five points for OV 2 (offender possessed or used a pistol), MCL 777.32(1)(d). We disagree with defendant's argument that OV 1 and OV 2 were erroneously scored because the evidence established that he only possessed a BB gun that did not qualify as a firearm under MCL 8.3t. First, contrary to what defendant argues, codefendant Plunk did not testify that the weapon used was only a BB gun. Rather, Plunk testified that he did not know if the weapon was a BB gun. Second, not all BB guns are excluded from the statutory definition of a firearm. Only handguns "designed and manufactured exclusively for propelling BB's not exceeding .177

calibre by means of spring, gas or air" are excluded from the statutory definition. MCL 8.3t. At trial, the complainant testified that defendant pressed a handgun against her head and threatened to "blow my head off or take the gun down and . . . blow my leg off, mutilate my leg." This testimony describing the weapon and defendant's threatened use of the weapon supports the trial court's scoring of OV 1 and OV 2.

The trial court scored 50 points for OV 7 (aggravated physical abuse). MCL 777.37 provides that 50 points are to be scored for OV 7 when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(1)(a). "Sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

The evidence indicated that defendant and his co-felons subjugated the complainant to their authority for an extended period. They intruded into her apartment, searched her personal possessions, and held her captive in her own vehicle. During the encounter, they clicked the gun against the back of her head and threatened to "blow [her] head off or take the gun down and . . . blow [her] leg off, mutilate [her] leg." The complainant's ordeal culminated in the indignity of serially performing fellatio on each of her four captors while the others watched, and while defendant attempted to sexually penetrate her from behind. This evidence was sufficient to establish that defendant's conduct was intended to substantially increase the complainant's fear and anxiety during the offense, and that she was also subject to prolonged humiliation for defendant's own gratification. Accordingly, the trial court did not err in scoring 50 points for OV 7.

The trial court scored 25 points for OV 11 (criminal sexual penetration). OV 11 is scored at 50 points where "[t]wo or more criminal sexual penetrations occurred[,]" 25 points where "[o]ne criminal sexual penetration occurred[,]" and zero points where there was no act of criminal sexual penetration. MCL 777.41(1). The trial court must "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). Here, the complainant testified that she was forced to commit four acts of fellatio, one on each perpetrator. Although the jury acquitted defendant of first-degree CSC, a scoring decision at sentencing need only be supported by the lesser preponderance of the evidence standard. *Osantowski*, 481 Mich at 111. The complainant's trial testimony established at least one act of sexual penetration by a preponderance of the evidence sufficient to justify the trial court's 25-point score for OV 11.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto